Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ELLIE BARTON UNDERWOOD, JR.,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Court Of Appeals
District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Constitution require that a trial court have a legitimate reason for denying a defendant the right to choose the lawyer who will represent him at the punishment phase of his trial?

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Underwood v. State, No. 11-02-00254-CR (Tex. App. – Eastland 2004, pet. ref'd) (not designated for publication). Appendix A, App. 1.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Court of Appeals District of Texas entered its judgment on March 25, 2004. Appendix A-1. Petitioner Underwood seeks review of that judgment on a writ of certiorari.

On July 1, 2004, petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals. On October 6, 2004, that court filed an order refusing the petition for discretionary review. Appendix B, App. 16. This petition for writ of certiorari is timely filed under Rule 13.1 of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Material To Consideration Of The Questions Presented

The indictment in this case charged that petitioner committed several sexual offenses on a single day against the same minor complainant.[1] Petitioner retained Martin Underwood as his lawyer in January, 2000, shortly after his arrest. Randy Wilson was hired as local counsel later that year. Both lawyers appeared for petitioner at the

[1] The offenses alleged were aggravated sexual assault, indecency with a child, and compelling prostitution. [CR – 2-3]

guilt/innocence phase of his trial, with Mr. Wilson serving as lead counsel.[2]

After the jury found petitioner guilty and before the punishment phase commenced, Mr. Wilson filed a Motion To Withdraw As Counsel. The motion asserted that petitioner no longer desired that Mr. Wilson represent him; instead, he wanted Martin Underwood alone as his lawyer.[3]

This motion was presented to the trial court outside the presence of the jury, at which time Mr. Wilson advised the court that co-counsel Underwood had been representing appellant Underwood for about two years, that they had worked together closely in the preparation of the trial, and that it had been planned that Martin Underwood would bear the primary responsibility for the punishment phase. Mr. Wilson also advised the court that his withdrawal would not delay the trial in any way, because lawyer Underwood was prepared to go forward immediately at that time. "They just don't want me to assist in any manner." The motion was agreed to by the prosecutor.[4]

Martin Underwood further advised the court that he had been involved in the case even before Mr. Wilson was recruited as co-counsel. He asserted that the petitioner's decision was a rational one, not made in acrimony, and he tendered petitioner to the court for any questions.[5]

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[2] [CR – 202]; [RR.III – 2; IV – 2; V – 2]; [RR.III – 47, 39]

[3] [CR. – 169]

[4] [RR.VI – 7]

[5] [RR.VI – 7]

The court had no questions, but made the following ruling:

> What concerns me, Mr. Underwood, is that there's nothing in the record to show that you've been involved in the case. I have no problem with you presenting as lead counsel on the punishment phase of the trial, but for our record's sake and for the jury's appearance at this phase, I am not going to allow Mr. Wilson to withdraw. He is going to continue to sit in here during this trial. I have no objections to you being the lead counsel in the punishment phase of the trial, but for appearances and for the record, since you have not taken an active role in it, I am going to deny his Motion to Withdraw. But I will allow you to present the case.[6]

The following exchange then occurred between petitioner and the court:

> THE DEFENDANT: Excuse me, Your Honor. Do I not have a right to choose the counsel that I want?
>
> THE COURT: You've made that choice. We are in mid trial, and he is going to continue to be in here during this trial. He may not take an active role, but he is going to continue to be here.[7]

The punishment phase continued with both lawyers present, although Martin Underwood examined the witnesses and delivered the summation. The jury rejected

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[6] [RR.VI – 7-8]

[7] [RR.VI – 8]

petitioner's application for probation and sentenced him to 35 years in prison.[8]

After trial, petitioner filed a motion for new trial and attached his affidavit, which stated that: he had hired Martin Underwood to represent him in January, 2000, and that Mr. Underwood had represented him continuously since that date; he hired Randy Wilson in May, 2000, as local counsel; both lawyers represented him in the guilt/innocence phase of his trial, with Mr. Wilson serving as lead counsel; after he was convicted, petitioner decided he could do better without Randy Wilson, since, in his judgment, the jury did not like him; because the trial court refused to permit the withdrawal, petitioner was unable to dissociate himself from Mr. Wilson, since he continued to sit at counsel table; he believed that he would have fared better had he been able to demonstrate to the jury that Mr. Wilson was no longer representing him.[9] The motion for new trial was denied after a brief hearing.[10]

B. How The Federal Questions Were Raised And Decided Below

After the trial court denied Mr. Wilson's motion to withdraw as counsel, petitioner himself questioned whether he would be allowed to choose his lawyer.[11] Later, in his motion for new trial, petitioner complained that the trial court's actions had denied him his right to counsel

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[8] [RR.VI – 214-215]

[9] [CR. – 202-203]

[10] [RR.VII – 11]

[11] [RR.VI – 8]

guaranteed by the Sixth Amendment to the United States Constitution.[12]

Petitioner argued in the court of appeals that the trial court's ruling denied him the right to choose his lawyer in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The court of appeals disagreed:

> Here, appellant had the lawyer he wanted during the punishment phase of his trial. The trial court allowed Martin to act as lead counsel during the punishment phase of the trial; that was the plan from the beginning. The record reflects that Wilson did not participate in any of the punishment proceedings in any manner except to sit at the counsel table. The trial court expressed its concerns over Martin's lack of actual participation in the guilt/innocence phase of the trial. The trial court also expressed its concern "for the record" as well as "the jury's appearance at this phase." The trial court did not deny appellant his right to retained counsel of his choice. The purpose of the Sixth Amendment and of Article I, section 10 of the Texas Constitution was met; appellant received effective representation by an attorney of his choice.[13]

Petitioner then sought discretionary review in the Texas Court of Criminal Appeals where he asserted that the Sixth Amendment broadly protected his right to choose counsel, and that the trial court could override his right

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[12] [CR. – 198]

[13] *Underwood v. State*, 2004 WL 584606 at *3.

only for important considerations, none of which pertained. That court refused to grant review.[14]

ARGUMENT

A. There Is A Constitutional Presumption In Favor Of Counsel Of Choice

This Court has long recognized the constitutional right of a defendant in a criminal case to choose his own lawyer at trial.[15] In *Faretta v. California*, this Court decided that the State may not "constitutionally hale a person into its criminal courts" and force or thrust a lawyer on him that he does not want.[16] "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense."[17] Because the defendant suffers the consequences of a failed defense, the defendant, not the State, has the right of choice.[18] In *Wheat v. United States*, this Court wrote that the Sixth Amendment creates a "presumption in favor of counsel of choice."[19]

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[14] Appendix B, App. 16.

[15] *Powell v. Alabama*, 287 U.S. 45, 53 (1931) ("hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice").

[16] 422 U.S. 806, 807, 817, 820, 833 (1974); *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) ("the Constitution does not force a lawyer upon a defendant:).

[17] *Id.* at 821.

[18] *Id.* at 834.

[19] 486 U.S. 153, 160 (1988).

B. A Legitimate Reason Has Always Been Required To Override The Presumptive Right To Choose Counsel

In *Wheat*, the Court recognized the presumption in favor of chosen counsel, but also allowed that the presumption may be overridden depending on the circumstances of the case. The Court mentioned three limitations on a defendant's right to choose a lawyer: counsel must be a member of the bar authorized to represent clients; the lawyer must be willing to represent the defendant; and, chosen counsel must not have a conflict.[20]

Later in *McKaskle v. Wiggins*, the Court rejected the defendant's complaints about the appointment of standby counsel over his objection, where, among other things, the appointment was necessary "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[21] Other courts have recognized that a defendant cannot insist on a particular lawyer where that choice will delay trial.[22]

These cases make it clear that, although the right to choose counsel is not absolute, it can only be overridden for some legitimate reason. Absent a legitimate reason, the

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[20] *Id.* at 159

[21] 465 U.S. 168, 184 (1984).

[22] *E.g., United States v. Hughey*, 147 F.3d 423, 428 (5th Cir.), *cert. denied*, 525 U.S. 1030 (1998) ("Sixth Amendment right to counsel of choice is limited, and protects only a paying defendant's fair or reasonable opportunity to obtain counsel of the defendant's choice").

trial court should not be able to override a defendant's right to choose his trial counsel.

C. No Legitimate Reason Was Given Here

In this case, none of the traditional concerns are present. Martin Underwood was a licensed lawyer, he was willing to represent petitioner, and he had no conflict of interest, actual or potential. Nor was there any danger that the trial would be delayed by Mr. Wilson's withdrawal, since Mr. Underwood made it clear he was prepared to proceed immediately.

Instead, the trial court here expressed two concerns when it refused petitioner's request to dismiss Mr. Wilson. In fact, neither of these concerns was sufficient to override petitioner's right to choose his lawyer.

First, the court worried that there was nothing in the record showing Martin Underwood's involvement in the case.[23] This is incorrect. In his motion to withdraw, Mr. Wilson advised the court that attorney Underwood had been representing petitioner for about two years, that they had worked together closely in the preparation of the trial, and that it had been planned that Martin Underwood would bear the primary responsibility for the punishment phase. Martin Underwood further advised the court that he had been involved in the case even before Mr. Wilson was recruited as co-counsel.[24]

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[23] [RR. VI – 7-8]

[24] [RR. VI – 7]

Moreover, the record affirmatively reflects that Mr. Underwood was present and involved in the trial from the beginning. The first page of each volume of the statement of facts from the trial reflects that both Randy Wilson and Martin Underwood appeared "for the defendant."[25] The record makes it clear that Martin was also present during jury selection.[26] Contrary to the court's assertion, the record clearly shows Martin Underwood's involvement in the case from the very beginning.

Second, the court expressed its concern "for the jury's appearance at this phase."[27] It is not clear what the court meant by this statement. In any event, it is not important, because some unspecified concern over appearances would not override a person's constitutional right to choose his lawyer. Absent a real reason to believe that the choice to dismiss Mr. Wilson would have some adverse impact on the case, there was no justification for disallowing this choice.

D. Contrary To What The Court Of Appeals Found, The Trial Court Did Deny Petitioner His Right To Choose Counsel

The court of appeals found that petitioner was not denied "his right to retained counsel of his choice" because the lawyer of his choice – Mr. Underwood – served as lead counsel, and because Mr. "Wilson did not participate in

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[25] [RR. III – 2; IV – 2; V – 2; VI – 2]

[26] [RR. III – 39; 47]

[27] [RR. VI – 7-8]

any of the punishment proceedings in any manner except to sit at the counsel table."[28]

Petitioner's constitutional complaint, though, is not that he was not allowed to choose that Martin Underwood be his primary attorney. It is that he was not allowed to choose – and to do so in a way that made clear to the jury – that Mr. Wilson would no longer serve as his lawyer in any way. The right to choose the lawyer who represents you also includes the right to choose who does not represent you. Appearances are important to litigants. In the *Wiggins* case, this Court recognized that appointed standby counsel must not impair the perception before the jury that a defendant is representing himself. "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself."[29]

Here, petitioner believed that Mr. Wilson was a damaging "messenger," and he sought to disassociate himself from Mr. Wilson. His choice was that Martin Underwood, not Randy Wilson, represent him, and he had the right to make that choice under the Sixth Amendment, unless there was some legitimate reason that he not be allowed to do so. When the trial court ordered that Mr. Wilson remain in the courtroom, at counsel table, for the duration of the punishment trial, it violated petitioner's right to choose his counsel under the Sixth and Fourteenth Amendment to the United States Constitution.

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[28] *Underwood v. State*, 2004 WL 584606 at *3.

[29] *McKaskle v. Wiggins*, 465 U.S. at 179.

E. Certiorari Should Be Granted Under Sup. Ct. R. 10(c)

The Founders undoubtedly "understood the inestimable worth of free choice."[30] Several decisions from this Court address the right of defendant in a criminal case to choose his trial lawyer.[31] These cases recognize that, while the right of choice is not absolute, it is important enough that it may only be overridden for a legitimate reason. The trial judge in petitioner's case had no legitimate reason when it denied him the right to choose who would represent him at the punishment phase of his trial. Certiorari should be granted under Rule 10(c) because the state court below has decided an important federal question in a way that conflicts with this Court's decisions in *Wheat, Wiggins*, and *Faretta*.

Respectfully submitted,

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[30] *Faretta v. California*, 422 U.S. at 834.

[31] *Wheat v. United States*, 486 U.S. 153 (1988); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Faretta v. California*, 422 U.S. 806 (1974).

APPENDIX A

11th Court of Appeals

Eastland, Texas

Opinion

Ellie Barton Underwood, Jr.

Appellant

Vs. No. 11-02-00254-CR – Appeal from Taylor County

State of Texas

Appellee

The jury convicted Ellie Barton Underwood, Jr. of aggravated sexual assault of a child, indecency with a child, and compelling prostitution. The jury then set his punishment at 35 years confinement for aggravated sexual assault, 10 years for indecency with a child, and 20 years for compelling prostitution. We affirm the convictions.

In the second count of the multi-count indictment the State charged appellant with the offense of indecency with a child by exposure. In appellant's third and fourth points of error, he argues that the evidence is legally and factually insufficient to prove beyond a reasonable doubt that he exposed himself with the intent to arouse and gratify his own sexual desire.

To determine if the evidence is legally sufficient, we must review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *Jackson v. State*, 17 S.W.3d 664 (Tex.Cr.App.2000). To determine if the evidence is factually sufficient, we must review all of the evidence in a neutral light and determine

whether the evidence supporting guilt is so weak as to render the conviction clearly wrong and manifestly unjust or whether the evidence supporting guilt, although adequate when taken alone, is so greatly outweighed by the overwhelming weight of contrary evidence as to render the conviction clearly wrong and manifestly unjust. *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex.Cr.App.2002); *Goodman v. State*, 66 S.W.3d 283 (Tex.Cr.App.2001); *Cain v. State*, 958 S.W.2d 404 (Tex.Cr.App.1997); *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App.1996). We review the fact finder's weighing of the evidence and cannot substitute our judgment for that of the fact finder. *Cain v. State, supra; Clewis v. State, supra.* Due deference must be given to the jury's determination, particularly concerning the weight and credibility of the evidence. *Johnson v. State*, 23 S.W.3d 1 (Tex.Cr.App.2000); *Jones v. State,* 944 S.W.2d 642 (Tex.Cr.App.1996), *cert. den'd*, 522 U.S. 832 (1997). This court has the authority to disagree with the fact finder's determination "only when the record clearly indicates such a step is necessary to arrest the occurrence of manifest injustice," *Johnson v. State, supra* at 9.

K.D., a 13-year-old female, ran away from home. A friend took her to Renee Dunn's house. Dunn was an adult. When K.D. and two other young girls who were also at Dunn's house were talking about making some money, Dunn suggested that they could make some money by "being with [appellant]." Dunn had known appellant for six or seven years. She and appellant had sex four or five times a month in the past, and appellant paid her $50 or $60 each time. Dunn testified that she arranged a date between appellant and K.D. about three or four days after K.D. came to her house. Appellant, Dunn, and K.D. went to an Econo Lodge motel. Appellant rented the room. He

and K.D. went in; Dunn stayed in the car. Appellant and K.D. stayed in the room about 30 minutes. When they came back to the car, appellant paid Dunn $60.

K.D. testified that, once inside the room, appellant told her that he liked to give and receive oral sex. When K.D. protested, appellant took a gun from his boot and held it to her head. After appellant and K.D. removed their clothes, they sat on the bed "for a minute and he was telling me it wasn't gross, and he went and washed himself off and said, Look, it's clean." As appellant held the gun to K.D.'s head, he put his penis inside her mouth and then inside her vagina, and they had sexual intercourse until he was finished. Appellant gave K.D. $60, and they went back to the car. They went either to McDonald's or Burger King to get something to eat. K.D.'s mother came to Dunn's house the next day and took K.D. home.

A former employee of Econo Lodge also testified during the guilt/innocence phase of the trial. He testified that he knew appellant. He remembered the day that appellant checked in at the Econo Lodge. He also remembered that appellant registered as "John Doe" and that he had a young girl with him. Although appellant had been coming to the Econo Lodge "off and on for about five years" and staying for usually no more than "a half hour" the employee never did get appellant's correct name.

TEX. PENAL CODE ANN. § 21.11 (Vernon 2003) provides in part:

> (a) A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person:

> (2) with intent to amuse or gratify the sexual desire of any person:
>
> > (A) exposes the person's anus or any part of the person's genitals, knowing the child is present.

Appellant directs his complaint to the legal and factual insufficiency of the evidence to show that he exposed himself with the intent to arouse or gratify his own sexual desire. The intent to arouse or gratify can be inferred from the conduct or remarks of the actor and the circumstances surrounding the conduct. *McKenzie v. State,* 617 S.W.2d 211, 216 (Tex.Cr.App.1981). Here, the proof presents sufficient evidence from which a rational fact finder could infer that appellant's conduct, his comments, and the surrounding circumstances showed an intent to arouse or gratify his own sexual desire. *See Cunningham v. State,* 726 S.W.2d 151, 154 (Tex.Cr.App.1987). The evidence shows that appellant went to the Econo Lodge to engage in sexual activities with K.D. Appellant sat naked while trying to convince K.D. to engage in oral sex with him. He went into the bathroom and washed himself and told K.D., "Look, it's clean." Appellant then went on to have both oral sex and vaginal intercourse with K.D. It was appropriate for the jury to deduce that appellant exposed himself with the intent to arouse or gratify his own sexual desire. Further, there is no contrary evidence for us to weigh. We hold that the evidence is both legally and factually sufficient to support the finding of guilt under count two of the indictment. Appellant's third and fourth points are overruled.

In his first two points of error, appellant argues that the trial court violated his rights under U.S. CONST. amend. VI and TEX. CONST. art I, § 10 when it refused to

allow him to "choose the lawyer who would represent him during the punishment phase" of the trial.

Appellant first retained his brother, Martin Underwood, an attorney, to represent him in this case. Later, Randy Wilson, an attorney from Abilene, was hired to assist in appellant's defense. Wilson was lead counsel during the guilt/innocence phase of the trial. Appellant and his lawyers had decided that Martin would be lead counsel during the punishment phase of the trial, if the case went that far. After the jury found appellant guilty, but before the punishment phase started, Wilson filed a motion to withdraw in which he alleged that appellant no longer wanted him to act as his lawyer. Appellant's complaint was grounded in his belief that the jury did not like Wilson, and he thought that he could do better if he were not associated with Wilson. The trial court denied the motion, but allowed Martin to act as lead counsel during the punishment phase of the trial. Wilson sat at the counsel table during the punishment phase of the trial, but did not participate.

Appellant's argument does not concern the denial of counsel of his choice. Rather, it concerns the trial court's refusal to release a retained attorney when another retained attorney of appellant's own choosing (who has been representing him during the trial, although not as lead counsel) in fact conducts that part of the trial for which he was originally chosen.

Both the federal and state Constitutions guarantee the right to effective assistance of counsel. *McFarland v. State*, 928 S.W.2d 482, 508 (Tex.Cr.App.1996), *cert denied*, 519 U.S. 1119 (1997). However, the purpose of the Sixth Amendment is not to make certain that a defendant is

afforded representation by the counsel he wants. *Wheat v. United States*, 486 U.S. 153, 159 (1988). Nevertheless, if a trial court unreasonably interferes with the right to choose retained counsel, that denial violates the Sixth Amendment. *Kozacki v. Knize*, 883 S.W.2d 760, 763 (Tex.App. – Waco 1994, no pet'n). In *McFarland*, the trial court appointed additional counsel to represent the defendant even though original counsel was retained. The defendant raised the objection that such action interfered with his right to choose his counsel. In *McFarland* the court held that: "Where a trial court deems . . . that retained counsel may need assistance, it is acceptable to *sua sponte* appoint additional counsel, and does not violate a defendant's right to counsel of choice." *McFarland v. State, supra* at 508.

The reasoning of *McFarland* is controlling in this case. Here, appellant had the lawyer he wanted during the punishment phase of his trial. The trial court allowed Martin to act as lead counsel during the punishment phase of the trial; that was the plan from the beginning. The record reflects that Wilson did not participate in any of the punishment proceedings in any manner except to sit at the counsel table. The trial court expressed its concerns over Martin's lack of actual participation in the guilt/innocence phase of the trial. The trial court also expressed its concern "for the record" as well as "the jury's appearance at this phase." The trial court did not deny appellant his right to retained counsel of his choice. The purpose of the Sixth Amendment and of Article 1, section 10 of the Texas Constitution was met; appellant received effective representation by an attorney of his choice. *See Wheat v. United States, supra.* Appellant's first and second points are overruled.

In the first count, the State charged appellant with the offense of aggravated sexual assault by causing his male sexual organ to penetrate K.D.'s female sexual organ; causing his male sexual organ to penetrate K.D.'s mouth; causing his male sexual organ to contact her female sexual organ; and causing her mouth to contact his male sexual organ. In the second count, the State alleged that appellant committed the offense of indecency with a child by exposing his genitals to K.D. The third count contained the State's charge that appellant committed the offense of compelling prostitution. By its verdict, the jury found appellant guilty of each count.

In his fifth point of error, appellant argues that the double jeopardy provision of the Fifth Amendment to the United States Constitution prohibits his being convicted of aggravated sexual assault as charged in count one and of indecency with a child by exposure as charged in count two. He argues that indecency with a child by exposure is a lesser included offense of aggravated sexual assault. To punish him for both would subject him to multiple punishments for the same offense and would subject him to double jeopardy. While appellant's proposition may be true in some situations, it is not universally so; and the issue must be decided on a case-by-case basis. *Gottlich v. State,* 822 S.W.2d 734, 738 (Tex.App. – Fort Worth 1992, pet'n ref'd).

The Fifth Amendment guarantee against double jeopardy is designed to protect against a second prosecution for the same offense following conviction, a second prosecution for the same offense following acquittal, and multiple punishments for the same offense. *Illinois v. Vitale,* 447 U.S. 410, 415 (1980); *Cervantes v. State,* 815 S.W.2d 569, 572 (Tex.Cr.App.1991). However, those who commit separate

assaults against the same person may be prosecuted and punished for each instance of criminal conduct. *Vernon v. State*, 841 S.W.2d 407, 410 (Tex.Cr.App.1992). The question is whether appellant committed one offense or two separate offenses when he sexually assaulted K.D. and when he exposed himself to her.

In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court set forth the test for determining whether two offenses are the same:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, supra at 304.

However, sexual offenses, even though they fall under the same statute, are not considered the same offense under *Blockburger* if they do not involve the same conduct. Prosecutions are barred by jeopardy only when there are multiple offenses arising from "the same act or transaction" in certain situations. *Vick v. State,* 991 S.W.2d 830, 833 (Tex.Cr.App.1999). In *Vick,* the court determined that the legislature intended, in sexual offense cases, to punish separate acts although the acts might be in close temporal proximity. *Vick v. State, supra.* If the acts are separate, then *Blockburger* is not implicated because they are not the same act or transaction.

The defendant in *Vick* was tried and acquitted of the offense of aggravated sexual assault. The State had alleged that Vick had committed the offense by causing the penetration of the female sexual organ of the victim by

his sexual organ. After Vick was acquitted, the State brought another indictment in which it alleged, among other things, that Vick caused the female sexual organ of the victim to contact his mouth. The trial court dismissed the second indictment based upon double jeopardy grounds. After the case was affirmed by the Amarillo Court of Appeals, the Texas Court of Criminal Appeals granted the State's petition for discretionary review. The Court held that *Blockburger* did not prohibit the second indictment and that there was no transgression of double jeopardy because the offenses did not involve the same conduct. The State alleged in the second indictment that Vick caused the victim's sexual organ to contact his mouth. The first indictment contained an allegation that Vick caused the penetration of the victim's sexual organ with his sexual organ. The offenses were separate and distinct acts even though they occurred during the same criminal transaction.

Appellant relies upon *Ochoa v. State*, 982 S.W.2d 904 (Tex.Cr.App.1998), *Patterson v. State*, 96 S.W.3d 427 (Tex.App. – Austin 2002, States pet'n granted, appellant's pet'n ref'd), and *Hutchins v. State,* 992 S.W.2d 629 (Tex.App. – Austin 1999, pet'n ref'd, untimely filed).

In *Ochoa*, the defendant was charged with five counts of aggravated sexual assault of a child occurring on different dates. He was also charged, in the same indictment, with five counts of indecency with a child by touching. Each of the dates of the five aggravated sexual assaults corresponded to the dates of each of the indecency offenses. The jury convicted Ochoa of only one aggravated sexual assault and one incident of indecency, both alleged to have occurred on June 16, 1994. The victim testified that Ochoa sexually assaulted her during the summer of

1994. She did not testify about any specific dates. One witness testified that the victim called her on June 16, 1994, and told her that Ochoa "put his thing in [her] butt." There was no testimony that Ochoa touched the victim more than one time on June 16, 1994. The Court of Criminal Appeals held that the evidence indicated that Ochoa committed only one offense on that date and that the trial court should not have submitted the case to the jury in such a manner that would allow them to convict Ochoa twice for the same offense. Either the State should have been required to elect upon which offense it would proceed or the trial court should have submitted the indecency allegation as a lesser included offense. *Ochoa v. State, supra.*

In *Hutchins,* the State charged in one indictment, among other things not here relevant, that Hutchins penetrated the female sexual organ of the victim with his penis, that he touched the victim's genitals with the intent to arouse and gratify his sexual desire, and that he exposed his genitals to the victim with that same intent. All of the allegations concerned the same date. The testimony was that Hutchins first touched the victim's sexual organ with his fingers and then penetrated her sexual organ with his penis. The Austin Court of Appeals held that it was undisputed that Hutchins exposed himself to the victim in the course of penetrating the victim's female sexual organ. The court further noted that Hutchins committed two violations in this regard: aggravated sexual assault by penetrating the victim's female sexual organ with his penis and indecency of a child by exposure. Because the violations arose from the same conduct, double jeopardy principles prevented a conviction for each offense, and the court set aside the conviction for indecency by exposure.

However, the court upheld the conviction for indecency with a child by touching the victim's genitals with his fingers. This touching by Hutchins with his fingers was not the same conduct as, and was distinct from, Hutchins's penetration of the victim's sexual organ with his penis. It was not a violation of double jeopardy to convict Hutchins of aggravated sexual assault by penetration and indecency of a child by touching. The court stated that the outcome would have been different if the only evidence of touching had been a touching with Hutchins's penis in the process of penetration of the victim's female sexual organ. *Hutchins v. State, supra.*

In *Patterson,* the indictment contained three counts and five paragraphs. The allegations were that Patterson penetrated the victim's anus with his penis; that he caused the victim's anus to contact his penis; that he touched the victim's anus with the intent to arouse or gratify his sexual desire; that he caused the victim to touch his genitals with the intent to arouse or gratify his sexual desire; and that he exposed his genitals in the victim's presence with the intent to arouse or gratify his sexual desire. The evidence before the jury showed that appellant twice penetrated the victim's anus with his penis. The court commented that the evidence was sufficient to support a conviction for aggravated sexual assault by penetration of the victim's anus by Patterson's penis and a conviction for aggravated sexual assault by contacting the victim's anus with his penis. The acts were separate and distinct and were not based upon the same conduct. Therefore, separate punishments for each do not constitute multiple punishments in violation of double jeopardy provisions. However, the court further observed that the only sexual contacts were the two acts of penetration and

that those support the aggravated sexual assault convictions. Therefore, the convictions for indecency by contact and indecency by exposure were based upon the same conduct as the conduct involving the two aggravated sexual assault convictions. Under the circumstances in *Patterson*, the indecency by contact was the same conduct giving rise to the two aggravated sexual assaults. Further, the only time Patterson exposed his penis was when he attempted to cause the victim to touch his penis and then he penetrated her anus with his penis. The court held that the exposure was conduct which was also included within the aggravated sexual assault convictions. *Patterson v. State, supra*. We note that on May 21, 2003, the Texas Court of Criminal Appeals granted the State's petition for discretionary review in *Patterson*.

The cases relied upon by appellant are at the same time distinguishable and instructive. In this case, appellant performed at least three distinct types of conduct: (1) when he was sitting naked talking to K.D. and showing her his clean penis; (2) when he penetrated K.D.'s mouth with his penis; and (3) when he vaginally penetrated her with his penis. The act of exposure was not merely incidental to the two penetrations. Although in close temporal proximity, the violations did not arise from the same conduct, and the punishment for those separate instances of conduct do not constitute multiple punishments for the same offense. Double jeopardy principles are not violated. *See Ochoa v. State, supra; Hutchins v. State, supra*. We overrule appellant's fifth point of error.

In his sixth point of error, appellant argues that, during its punishment phase argument, the State argued things to the jury that were not in the record. In its argument, the State basically told the jury that appellant

had been doing this very same thing for many years. Appellant's chosen attorney objected, and the trial court sustained the objection. The trial court also instructed the jury to disregard the argument. However, the trial court denied appellant's motion for mistrial which is what appellant complains of on appeal.

Jury argument by the State must fall within one of the following general categories in order to be permissible: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Felder v. State,* 848 S.W.2d 85, 94-95 (Tex.Cr.App.1992), *cert. den'd,* 510 U.S. 829 (1993). If the defendant's attorney invites the argument, then the State is allowed to respond to the argument. *Albiar v. State*, 739 S.W.2d 360, 362 (Tex.Cr.App.1987). The State maintains that its argument was invited by appellant's attorney.

Appellant's attorney made the following statement during jury argument:

> You know, you can draw on your own experiences, and you should. Common sense is what makes this system work. Do people somehow all of a sudden at age 63, 62, change from a much admired person who no one can think of any criticism of to a sex maniac? Can that really happen in your experience? Do you know people like that, that all of a sudden at age 63 just went crazy? Maybe you do. I don't. But that is something to think about, isn't it?
>
> Maybe you could postulate, well, he's been doing this ever since he was 14 years old for the last 40 years. That's pretty unlikely, isn't it? What we've – what it looks like we're saying here

> is that somehow a man who lived as close to a perfect life as anybody could, all of a sudden becomes a sex maniac.

The States's argument about which appellant complains was made following appellant's argument. The State argued:

> His biggest problem is he wants to have sex with girls and pay money for it . . . He didn't change all of a sudden. He didn't start at 63 and become a sex maniac. This is a long progression. He has done this over a course of many years.

The State's argument was permissible as a response to the argument made by appellant's attorney. Furthermore, Jennifer Denise Johnson testified that she and her mother, Tillie Johnson, had procured girls for appellant. Another witness, Judy Sapp, testified that she had procured girls for appellant during the 15 years that she had known him. The desk manager employed by Econo Lodge testified that appellant had been there about 250 times and that he usually brought a girl there with him.

Appellant testified that he did not go to the Econo Lodge as often as the desk clerk said and that the times he did go there was in connection with his volunteer counseling ministry that included tutoring and financial assistance on occasion. His home and the homes of those he counseled were normally too crowded and too noisy to be conducive to the performance of his work. At times, the counseling sessions would conclude with the participants going out for a meal. He never went to the motel for sexual purposes, only to engage in his ministry of helping others with their problems. He had performed these counseling services for Tillie Johnson and Renee Dunn, among others,

The State's argument was within the bounds of permissible jury argument because it was invited by appellant's attorney's argument and also because it was a proper summation of the evidence. Appellant's sixth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ [Illegible]
JIM R. WRIGHT
JUSTICE

March 25, 2004

Do not publish. See TEX.R.APP.P. 47.2(b).

Panel consists of: Arnot, C.J., and Wright, J., and McCall, J.

APPENDIX B

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/6/2004
COA#: 11-02-00254-CR
RE: Case No. PD-0684-04
STYLE: UNDERWOOD, ELLIE BARTON, JR.

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

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